

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Universal Service Contribution)	WC Docket No. 06-122
Methodology)	
)	GN Docket No. 09-51
A National Broadband Plan For Our)	
Future)	

To: The Commission

**Comments
of the
Retail Industry Leaders Association**

The Retail Industry Leaders Association (“RILA”) hereby submits its Comments in response to the Further Notice of Proposed Rulemaking in which the Federal Communications Commission (‘the Commission’) requests comment on proposed revisions to the manner in which Universal Service Fund (“USF”) contributions are assessed,¹ focusing on one proposal related to prepaid calling card revenues.

Preliminary Statement

RILA is the trade association of the world’s largest and most innovative retail companies. RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Its members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in

¹ *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Further Notice of Proposed Rulemaking, FCC 12-46 (released April 30, 2012) (“Further Notice”).

annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

Discussion

RILA fully supports the goals of Universal Service. Members conduct operations in many rural areas of the country that would benefit from a more robust telecommunications infrastructure that the Commission is striving to foster and implement through refocused USF support. As end-users of telecommunications services, members contribute indirectly to USF as telecommunications carriers routinely pass-through their universal service assessments as surcharges in monthly end-user bills for telecommunications services.

The Further Notice is problematic for RILA because it proposes retailers contribute to USF based on revenues paid to retailers for prepaid calling cards sold in stores or online. Further Notice, at ¶ 192. Under its proposed “value-added” refinement to the end-user revenue approach, retailers marketing prepaid calling cards are transformed into “providers of telecommunications services” and would contribute to USF “based on the value the provider adds to the service.”

This proposal is not well-conceived. Retailers that market prepaid calling cards are not telecommunications services providers, within the scope of 47 U.S.C. §254(d) or otherwise, just as they are not transformed into restaurant operators by virtue of selling gift/purchase cards for seafood restaurants or steakhouses at discounts to the face value of these cards. Rather, actual restaurant operators and telecommunications services providers recognize the value of marketing their dining experiences and telecommunications services, respectively, in heavily trafficked retail establishments, based on demographic and other criteria that restaurant owners and telecommunications services providers find desirable.

That implementation of a value-added approach for assessing USF contributions would effectively characterize retailers and other entities that market prepaid calling cards as “providers of telecommunications services” strains all credibility. The seemingly intractable disagreements between calling card services providers and Universal Service Administrative Company (“USAC”) over assessable prepaid calling card revenues, as highlighted in the Further Notice,² do not support, justify or warrant characterizing persons engaged in marketing prepaid cards as providers of telecommunications services. Contrary to the unsupported assertions in the Further Notice, it is long-established that commissions may be paid to persons marketing prepaid calling cards, that a portion of the retail price of prepaid cards may include the marketer’s commission, and that the sale of prepaid cards by retailers or other marketers does not, without more, transform retailers or other distributors into telecommunications services providers.

In BellSouth,³ the Common Carrier Bureau concluded that BellSouth’s marketing of a BellSouth-branded prepaid calling card did not constitute the impermissible provision of in-region, interLATA service under Section 271 of the Act, based, in part, on findings that BellSouth was neither holding itself out as a provider of long distance service nor engaging in functions typically performed by resellers. The Bureau reached this conclusion explicitly acknowledging that “BellSouth receive[d] a commission amounting to a substantial portion of each Card’s face value,”⁴ and entered into “sub-agency” agreements with independent marketing

² See also, USTelecom Mar. 28, 2012 *Ex Parte* Letter at 4-5 (noting unresolved USAC contribution appeals of disparate classifications of prepaid calling card revenues pending since 2006).

³ *AT&T Corp. v. BellSouth Corporation*, Memorandum Opinion and Order, Chief, Common Carrier Bureau, DA-99-609 (rel. March 30, 1999). (“BellSouth”). The focus of this matter was not whether BellSouth was the facilities-based services provider, but whether it was providing the service as a reseller. *Id.* at 29.

⁴ BellSouth, at ¶ 8.

organizations.⁵ The Bureau expressly declined to declare BellSouth a services provider by virtue of BellSouth's name on the calling card and the facts and circumstances associated with its marketing arrangement with the underlying interexchange services provider. The Bureau considered a range of factors, including whether the underlying carrier is clearly identified on the card as the service provider, which entity serves as the initial point of contact for customer questions and complaints, and whether BellSouth set the rates for the service. The Bureau concluded that, in connection with its namesake prepaid calling card, BellSouth was engaged in the marketing of prepaid calling cards, acting comparable to "other issuers of these prepaid cards," including a major retailer and a leading petroleum company, "companies that clearly are not telecommunications providers," and emphasizing these entities "cannot be said to be holding themselves out as providing such service through their prepaid calling cards."⁶

BellSouth establishes that the distinction between marketing prepaid calling cards and the provision of telecommunications services is real and cognizable. Without due consideration of the relevant factors, there is no rational basis to conclude that the marketing of prepaid calling cards is tantamount to the provision of telecommunications service. In turn, there is no rational basis to require retailers that market prepaid calling cards to register with USAC, file Forms 499-Q and 499-A and remit payments to USAC.⁷ Consistent with Bell South, RILA understands that, as a general rule, the agreements offered to major retailers with respect to prepaid calling cards

⁵ BellSouth, at ¶ 9.

⁶ BellSouth, at ¶ 33.

⁷ On the other hand, RILA does not and cannot suggest or maintain that entities marketing prepaid calling cards have never or could never "cross the line" and hold themselves out as telecommunications services providers. As a general rule, however, RILA believes this step would not be undertaken by the vast preponderance of its members, but if it were, members would do so in full compliance with applicable requirements.

are presented and structured as marketing agreements with compensation (commission) arrangements, as opposed to wholesale services agreements in which the retailer is requested to execute a USF exemption certificate for the services provider's records and assume USF contribution obligations.

Retailers are marketing companies that are expert in logistics, product selection and pricing for targeted consumers in various merchandise categories and segments. Simply selling pre-paid telecommunications access cards does not render those retailers "telecommunications services providers" subject to the wide array of requirements to which such providers are subject and with which retailers have no reasonable expectation of assuming. Telecommunications services providers are subject to state and federal telecommunications compliance obligations that are generally unfamiliar to retailers, as well as a confusing collection of state telecom-related taxes, which RILA understands pose vexing interpretation and compliance challenges for even the largest telecommunications services providers. These challenges are not lightly assumed by leading retailers. Again, the marketing of prepaid calling cards in stores is similar to selling gift/purchase cards of other businesses at noticeable discounts from the face value of the cards. The store is leveraging its ability to attract consumer floor traffic that other businesses believe includes a sufficient number of individuals falling within the desired demographics for their goods or services.

In view of the foregoing, RILA strongly believes the Commission and telecommunications carriers ("prepaid calling card providers") would be better served by focusing on the "bright line" tests that are proposed for assessing USF contributions on carriers' prepaid calling card revenues. Further Notice, at ¶184. More broadly, RILA agrees with the leading telecommunications carriers and other stakeholders within the telecommunications

industry that carriers and end users would be better served by transitioning to a numbers-based approach for assessing USF contributions.

A cursory review of the Further Notice reveals numerous challenges associated with the end-user revenue approach for assessing USF contributions in addition to those associated with prepaid calling cards. These include determining the assessable revenues in bundled offerings of telecommunications, information, and network management services and equipment, Further Notice, at ¶¶ 101-113; assessing information services revenues in their entirety or some portion thereof in light of the “telecommunications” component present in these services, Further Notice, at ¶¶ 114-120; and, classifying text messaging as a telecommunications service and thereby USF assessable, Further Notice, at ¶¶ 49-56. In light of the definitional issues inherent in categorizing services as either information or telecommunications services, concerns over the ability of USAC to audit carriers’ records under many of the proposed refinements to the existing end-user revenue approach, and delays in resolving USAC contribution appeals, as noted by USTelecom, a fresh approach to assessing USF contributions appears warranted.

The numbers-based approach set out in the Further Notice merits serious consideration. This approach would track the ongoing transition from plain old telephone service (POTS) to VoIP and Wireless services for voice services. While it may be true that revenues derived from higher capacity services such as those used by large businesses and high speed Internet access services offered by cable companies and others to business and residential customers might not be subject to USF assessment, the fact remains that the major telecommunications carriers (for Wireless and Wireline services) regularly recover their USF contributions from their customers (enterprise, small business and residential) via surcharges in monthly bills. Leading retailers, other businesses (large and small), and residential customers continue to use telephone numbers,

will continue to do so for the foreseeable future, including toll free numbers used extensively by member retailers for a variety of purposes, including customer service, product purchasing and help desk functions. RILA understands that numbers continue to be assigned on a steady and persistent basis to members of the retail community.

In conclusion, RILA urges the Commission not to adopt the proposal that would classify retailers engaged in marketing prepaid calling cards to register with USAC, file quarterly and annual reports and, as warranted, remit USF contributions, and to take further action consistent with the views expressed herein.

Respectfully submitted,



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